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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN WAYNE SMITH,

Defendant and Appellant.

A148780

(Sonoma County
Super. Ct. No. SCR-677100)

Defendant Jonathan Wayne Smith pleaded no contest to felony assault with a deadly weapon (Pen Code,¹ § 245, subd. (a)(1)) and admitted one prior strike (§§ 667, subds. (d)–(e), 1170.12, subds. (b)–(c)) and one prison prior (§ 667.5, subd. (b)). In accordance with the negotiated disposition, the trial court sentenced defendant to a total term of five years in state prison. Defendant raises a single issue on appeal—that the trial court had no authority, as part of the sentence, to issue stay away orders pertaining to the victim and the codefendant. The Attorney General does not dispute that the trial court lacked authority to issue the postconviction stay away orders, but asserts defendant cannot raise the issue on appeal because he failed to apply for and obtain a probable cause certificate. We agree with the Attorney General and therefore dismiss defendant’s appeal.

At the outset of the case, the trial court issued a “Criminal Protective Order—Other Than Domestic Violence” pertaining to the victim. The court identified the basis

¹ All further statutory references are to the Penal Code unless otherwise indicated.

for the order (by checking a box on the Judicial Council form) as section 136.2 (as opposed to § 136.2(i)(1) or § 646.9(k)). The form specifies the protective order expires three years from issuance (February 5, 2019).

Three months later, defendant completed and filed an “Advisement of Rights, Waiver, and Plea Form For Felonies.” This specified that the sentence would include a “stay away from victim, co-defendant.” At the change of plea hearing, before accepting defendant’s no contest plea, the trial court reiterated that a “stay away from the victim and the co-defendant” was a term of the negotiated disposition.

The probation report prepared for the sentencing hearing described the “plea negotiations” as follows: “The *Tahl*^[2] Waiver notes a plea per 1192.5 PC. Probation will be denied. ‘5 years: mitigated term of two years on count 1 (doubled for 1170.12 prior), with one 667.5(b) prior parole vio. concurrent. Stay away from victim, co-defendant.’ People’s motion to dismiss Count 2: felony 211 PC and enhancements per 667(a) PC and 12022(b)(1) PC, with *Harvey*^[3] Waiver at the time of sentencing.” The report also states: “Criminal Protective Order: A criminal protective order (CPO) was issued on 02/05/16 prohibiting [defendant] from contacting the victim. The protective order is due to expire on 02/05/19.”

In accordance with the negotiated disposition, the court, at sentencing, ordered defendant to “stay away from [the victim] and [the codefendant].” The clerk’s minutes of the sentencing hearing, likewise state defendant is to “stay away from [the victim] & [the] co-def.” No written protective or stay away order was issued following the sentencing hearing.

It is now well-established that, except in the case of victims of domestic violence or section 290 (Sex Offender Registration Act) registration offenses, section 136.2 does not provide a basis for imposing a *postconviction* protective order. (E.g., *People v.*

² *In re Tahl* (1969) 1 Cal.3d 122, disavowed in part in *Mills v. Municipal Court* (1973) 10 Cal.3d 288, 306–307, footnote 16, and superseded on another ground as stated in *People v. Carty* (2003) 110 Cal.App.4th 1518, 1523–1524.

³ *People v. Harvey* (1979) 25 Cal.3d 754.

Beckemeyer (2015) 238 Cal.App.4th 461, 465 [“The courts have construed section 136.2, subdivision (a) to authorize imposition of protective orders only during the pendency of the criminal action.”]; *People v. Therman* (2015) 236 Cal.App.4th 1276, 1279 [§ 136.2, subd. (i) allows postjudgment protective orders where defendant is convicted of a domestic violence crime or crime requiring § 290 registration]; *People v. Ponce* (2009) 173 Cal.App.4th 378, 382–384 [trial courts have no authority under § 136.2, nor do they have inherent authority, to issue a postconviction protective order]; *People v. Selga* (2008) 162 Cal.App.4th 113, 118–119 [“protective orders issued under section 136.2 were operative only during the pendency of the criminal proceedings and as prejudgment orders”].)

In none of these cases, however, did the prosecution contend the defendant was precluded from challenging a protective order because it was part of a negotiated disposition and the defendant failed to apply for and obtain a probable cause certificate. And an equally well-established body of law holds the parties to the terms of a negotiated disposition. Accordingly, a defendant who enters into a negotiated disposition generally cannot appeal any issue connected with the plea unless he or she has applied for, and the trial court has granted, a certificate of probable cause. (§ 1237.5; *People v. Shelton* (2006) 37 Cal.4th 759, 766; *People v. Panizzon* (1996) 13 Cal.4th 68, 74 (*Panizzon*).) There is an exception to this requirement for post-plea claims, including sentencing issues. (*People v. Cuevas* (2008) 44 Cal.4th 374, 379 (*Cuevas*); *Panizzon*, at p. 74.)

The Attorney General maintains the sentencing issue exception does not apply here, however, because the stay away orders were an integral part of the plea deal, and therefore defendant is, in fact, challenging a plea-related aspect of the case, which he cannot do without a probable cause certificate. “Even where a defendant purports to challenge only the sentence imposed, a certificate of probable cause is required if the challenge goes to an aspect of the sentence to which the defendant agreed as an integral part of a plea agreement.” (*People v. Johnson* (2009) 47 Cal.4th 668, 678.)

Panizzon, supra, 13 Cal.4th 68, is illustrative. In that case, the defendant claimed his sentence, which he agreed to as part of a negotiated disposition, was unconstitutional

because it was disproportionally long compared to sentences the other codefendants received. The Supreme Court concluded that, even though couched as post-plea sentencing error, the defendant was in actuality challenging “an integral part of the plea agreement,” which he was foreclosed from doing absent a probable cause certificate. (*Id.* at pp. 77–78.) “[A]ll the trial court did here,” said the high court, “was to sentence defendant in accordance with the previously entered plea.” (*Id.* at p. 78.) The court distinguished cases that had allowed post-plea appeals raising sentencing issues. Those pleas involved only issues of guilt “without specification of the penalty to be imposed.” (*Ibid.*, italics omitted.) The case at hand differed, said the court, because “the sentence defendant received was part and parcel of the plea agreement he negotiated with the People.” (*Ibid.*) The statutory certificate requirement, thus, applied because the defendant’s claim “that the sentence violated the constitutional prohibition against cruel and unusual punishment” fell “squarely within the parameters of a challenge to the plea.” (*Ibid.*) “In sum,” the court was persuaded “that a challenge to a negotiated sentence imposed as part of a plea bargain is properly viewed as a challenge to the validity of the plea itself,” and therefore it “was incumbent upon [the] defendant to seek and obtain a probable cause certificate in order to attack the sentence on appeal.” (*Id.* at p. 79.)

These comments pertain equally to defendant’s appeal here. The record clearly reflects that the stay away orders pertaining to the victim and the codefendant were “part and parcel” of the agreed-to disposition. Thus, even if the trial court erred in viewing the interim protective order under section 136.2 as continuing and duly incorporated into the sentence, that is not an error defendant can challenge on appeal in the absence of probable cause certificate. (See *Cuevas, supra*, 44 Cal.4th at p. 384 [in asserting claim of sentencing error under § 654, the defendant was “not challenging the court’s exercise of sentencing discretion, but attacking its *authority* to impose consecutive terms” which “amount[ed] to a challenge to the plea’s validity, requiring a certificate of probable cause”].)

Given our conclusion that defendant was required to apply for and obtain a probable cause certificate in order to appeal, but he did not do so, his appeal is dismissed.

Banke, J.

We concur:

Humes, P.J.

Dondero, J.

A148780, *People v. Smith*